

interest was better served by allotting a second aural transmission service to the larger and more isolated community of Plainview, Texas, than a first aural transmission service to Slaton, Texas. In that finding, the Commission was clearly influenced by the fact that the competing applicant was a Plainview competitor and therefore was suspected of filing an application at another community (Slaton) to eliminate the potential competition. Furthermore, the Slaton proposal would cause prohibited overlap and interference to another AM station. Despite the interference and the applicant's questionable motives, the Court of Appeals found in favor of Slaton and ordered a remand of the case. See Harrell v. FCC, 18 RR at 2073-74, 267 F.2d 629 (D.C. Cir. 1959).

31. In Harrell, the court found that the Commission's holding that Plainview's needs outweighed those of Slaton was not supported by substantial evidence. Id. at 2074-75. On remand, the Commission reversed its initial decision, and granted a construction permit to the Slaton applicant because "[i]n so far as service to Slaton is concerned, there has been no appreciable detracting from the 307(b) presumption favoring a first-local transmission facility." See Plainview Radio, 21 RR 885, 886 (1961) (Plainview II). Thus, Van Wert relied on a case that had been overruled. Not surprisingly, the Commission

has not relied upon Van Wert to deny a first local service in a similar case until this one.<sup>11/</sup>

32. Accordingly, the Commission's position which relies on Van Wert has been thoroughly discredited. Whenever Van Wert is cited in the change of community context, it is generally done to state the presumption in favor of a first local service rather than to deny the higher priority service.<sup>12/</sup> Without Van Wert as viable precedent to the contrary, the Commission must reconsider its decision. The overwhelming body of similar case law favors the provision of a first local service without even considering the relatively minor factors of relative size, proximity, and reception service.

### CONCLUSION

33. The Commission's rejection of OCG's petition was clearly contrary to Commission precedent and policy. The Commission has never before (except the discredited Van Wert) relied on the minor factors of relative size and proximity (much less comparative reception service) to deny a first local transmission service to an independent community located outside

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<sup>11/</sup> Plainview II actually supports OCG's petition, because in that case the Commission eventually allotted a station to Slaton which (like Helotes) was (1) closer to a large central city than Plainview, and (2) was much smaller than Plainview.

<sup>12/</sup> The Commission "will not presume that a community outside of, but near, an Urbanized Area is not entitled to a first local transmission service preference." Van Wert, supra, 7 FCC Rcd at 6520.

an Urbanized Area. The Commission has wrongly decided this case considering the numerous other cases which favored a first local service in strikingly similar circumstances.

34. The public interest benefit accruing from the provision of a first local service to Helotes or Castroville clearly outweigh the loss of one of two Fredericksburg's radio stations. The Commission has consistently allowed licensees to relicense stations to new communities where: (1) the new community without service was smaller than the prior community with service, (2) the new community was closer to but not within an Urbanized Area than the prior community of license, (3) the prior community of license would be left with a daytime-only AM station, and (4) the prior community of license would be left with at least five reception services. Thus, the Commission should not deny OCG's petition based on such factors.

35. On the other hand, the Commission has relied on a case (Van Wert) which is of questionable authority because it in turn relied on the Plainview case which was reversed on appeal. The Plainview case actually supports the instant petition to allow the move to Helotes or Castroville. Petitioner's proposal to serve Helotes or Castroville is the only opportunity to provide local service to either of these communities. As noted (§11), no other AM or FM allotment is possible under the Commission's technical standards.

36. For the reasons stated above, the Commission must reverse its prior decision denying OCG's petition for rule making.

Respectfully submitted,

By:

  
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**OCTOBER COMMUNICATIONS GROUP, INC.**

July 21, 1995

**EXHIBIT A**

**RELEVANT CASES GRANTING PETITIONS TO  
CHANGE COMMUNITY OF LICENSE**

**RELEVANT CASES GRANTING PETITIONS TO  
CHANGE COMMUNITY OF LICENSE**

This table lists cases in which the FCC has granted requests to change a station's community of license, even though (1) the proposed community of license was significantly smaller than the prior community of license, (2) the proposed community of license was closer to a (relatively) large city than the prior community of license, or (3) the proposed community of license had more reception service than the prior community of license.

An "x" indicates the factor was present in the Commission's decision or ascertainable from official sources.

In the category of reception service, in all cases, this factor was not discussed in the Commission's decision nor ascertainable from any official sources. Therefore an "N/A" for "not available" is placed in the box.

**PROPOSED COMMUNITY**

<b>CASE</b>	<b>SMALLER</b>	<b>CLOSER</b>	<b>RECEPTION SERVICE</b>
Douglas, Tifton and Uniondale, Georgia, MM Doc. No. 93-316 (July 17, 1995)		x	N/A
Camden, East Camden, and Stamps, Arkansas; Gibsland and Minden, Louisiana, MM Doc. No. 92-217 (June 29, 1995)	x		N/A
Latta, Marion, Camden and Blythewood, South Carolina, MM Doc. No. 93-47 (June 29, 1995)	x	x	N/A
Albion, Lincoln and Columbus, Nebraska, MM Doc. No. 91-304 (June 27, 1995)		x	N/A
Nowata and Collinsville, Oklahoma, MM Doc. No. 91-255 (June 27, 1995)	x	x	N/A

<b>CASE</b>	<b>SMALLER</b>	<b>CLOSER</b>	<b>RECEPTION SERVICE</b>
Canovanas, Culebra, Las Piedras, Mayaguez, Quebradillas, San Juan, and Vieques, Puerto Rico, and Christiansted and Fredericksted, Virgin Islands, MM Doc. No. 91-259 (June 22, 1995)			N/A
(a) reallocation of station from Christiansted to Vieques,	x		N/A
(b) reallocation of station from Vieques to Las Piedras		x	N/A
Sanger and Sherman, Texas, MM Doc. No. 94-57 (June 19, 1995)	x	x	N/A
Tallassee and Tuskegee, Alabama, MM Doc. No. 92-196 (June 13, 1995)	x	x	N/A
Midway, Panacea and Quincy, Florida, MM Doc. No. 93-229 (June 9, 1995)	x	x	N/A
Sulphur and South Fort Polk, Louisiana; Bay City, Edna, Galveston, Jasper, LaGrange, New Ulm, Palacios, Redland, Rosenberg, and Winnie, Texas, 10 FCC Rcd 4952 (1995)	x	x	N/A
Huntsville and Willis, Texas, 10 FCC Rcd 3329 (1995)	x	x	N/A
Ravenswood and Elizabeth, West Virginia, 10 FCC Rcd 3181 (1995)	x	x	N/A
East Los Angeles, Long Beach and Frazier Park, California, 10 FCC Rcd 2864 (1995)	x	x	N/A

<b>CASE</b>	<b>SMALLER</b>	<b>CLOSER</b>	<b>RECEPTION SERVICE</b>
Oshkosh, Winneconne, and Townsend, Wisconsin and Menominee, Michigan, 10 FCC Rcd 2085 (1995)	x		N/A
Calabash and Tabor City, North Carolina, 9 FCC Rcd 7857 (1994)	x	x	N/A
Charlotte Harbor, Marco and Punta Gorda, Florida, 9 FCC Rcd 5725 (1994)	x		N/A
Elizabeth City, North Carolina and Chesapeake, Virginia, 9 FCC Rcd 3586 (1994)		x	N/A
Eatonton, Fayetteville, Greenville, Hogansville, Sparta, and Thomaston, Georgia, and Ashland and Valley, Alabama, 8 FCC Rcd 4938 (1993)			N/A
(c) Sparta, Georgia to Eatonton, Georgia		x	N/A
(d) Griffin, Georgia to Fayetteville, Georgia	x	x	N/A
Denison and Pilot Point, Texas, 9 FCC Rcd 3039 (1994)	x		N/A
Campbellsville and Mannsville, Kentucky, 8 FCC Rcd 2880 (1993)	x		N/A
Leesburg and Tavares, Florida, 8 FCC Rcd 2817 (1993)	x	x	N/A
Indiantown and Okeechobee, Florida, 8 FCC Rcd 2218 (1993)	x	x	N/A



<b>CASE</b>	<b>SMALLER</b>	<b>CLOSER</b>	<b>RECEPTION SERVICE</b>
Mora, Bosque Farms and Socorro, New Mexico, 8 FCC Rcd 791 (1993)	x	x	N/A
Hampton and Parkersburg, Iowa, 7 FCC Rcd 7559 (1992)	x	x	N/A
Fruitland and Weiser, Idaho, 7 FCC Rcd 7538 (1992)	x	x	N/A
Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992)		x	N/A
Wetumpka, Brantley, and Luverne, Alabama, 7 FCC Rcd 5916 (1992)		x	N/A
Fisher, Mattoon, Neoga, Teutopolis, and Tuscola, Illinois, 7 FCC Rcd 5223 (1992)	x		N/A
Scotland Neck and Pinetops, North Carolina, 7 FCC Rcd 5113 (1992)	x	x	N/A
Kindred and Oakes, North Dakota, 7 FCC Rcd 1996 (1992)	x	x	N/A
Kershaw, South Carolina, and Waxhaw, North Carolina, 7 FCC Rcd 656 (1992)	x	x	N/A
Milford and Hastings, Nebraska, 7 FCC Rcd 653 (1992)	x	x	N/A
Callahan, Florida, and St. Marys, Georgia, 6 FCC Rcd 7564 (1991)	x	x	N/A
Osceola, Arkansas, and Millington, Tennessee, 6 FCC Rcd 6630 (1991)		x	N/A

<b>CASE</b>	<b>SMALLER</b>	<b>CLOSER</b>	<b>RECEPTION SERVICE</b>
Huntingdon and Atwood, Tennessee, 6 FCC Rcd 6475 (1991)	x	x	N/A
Hamilton and Glen Rose, Texas, 6 FCC Rcd 6015 (1991)	x		N/A
Cleveland and Rosedale, Mississippi, 6 FCC Rcd 5583 (1991)	x		N/A
Lexington and Pickens, Mississippi, 6 FCC Rcd 5559 (1991)	x	x	N/A
Los Angeles and Norwalk, California, 6 FCC Rcd 5317 (1991)		x	N/A
New Bern and Oriental, North Carolina, 6 FCC Rcd 5309 (1991)	x		N/A
Pine Bluff and Maumelle, Arkansas, 6 FCC Rcd 5119 (1991)	x	x	N/A
Winslow and Kachina Village, Arizona, 6 FCC Rcd 5117 (1991)	x		N/A
Portageville and New Madrid, Missouri, 6 FCC Rcd 4305 (1991)	x	x	N/A
Holly Springs and Byhalia, Mississippi, 6 FCC Rcd 4305 (1991)	x	x	N/A
Cold Spring and Litchfield, Minnesota, 6 FCC Rcd 3664 (1991)	x	x	N/A
Waupun and Omro, Wisconsin, 6 FCC Rcd 3656 (1991)	x		N/A

<b>CASE</b>	<b>SMALLER</b>	<b>CLOSER</b>	<b>RECEPTION SERVICE</b>
Marathon and Stevens Point, Wisconsin, 6 FCC Rcd 3649 (1991)	x	x	N/A
Bolivar and Nixa, Missouri, 6 FCC Rcd 3648 (1991)	x	x	N/A
Marion and Orrville, Alabama, 6 FCC Rcd 3482 (1991)	x	x	N/A
McComb, Mississippi, and Kentwood, Louisiana, 6 FCC Rcd 3367 (1991)	x		N/A
Paragould and Lake City, Arkansas, 6 FCC Rcd 3325 (1991)	x	x	N/A
Lemoore and Tipton, California, 6 FCC Rcd 2593 (1991)	x	x	N/A
Jesup and Midway, Georgia, 6 FCC Rcd 2196 (1991)	x	x	N/A
Buffalo and Vine Grove, Kentucky, 6 FCC Rcd 2160 (1991)		x	N/A
Brookston and Monticello, Indiana, 6 FCC Rcd 1505 (1991)	x	x	N/A
Ballston Spa and Saratoga Springs, New York, 6 FCC Rcd 1434 (1991)	x	x	N/A
Zanesville and South Zanesville, Ohio, 5 FCC Rcd 6726 (1991)	x		N/A

**EXHIBIT B**

**PLAINVIEW RADIO**

Commission Decision  
15 RR 363 (1958)



FCC 58-449  
57857  
24 FCC-405

In re Applications of	)	
	)	
Earl S. Walden, Homer T. Goodwin and	)	
Leroy Durham, dba	)	
PLAINVIEW RADIO	)	Docket No. 11836
Plainview, Texas	)	File No. BP-10200
	)	
Troyce H. Harrell and Kermit S. Ashby, dba	)	
STAR OF THE PLAINS B/CASTING CO.	)	Docket No. 11837
Slaton, Texas	)	File No. BP-10499
	)	
For Construction Permit	)	

[§51:301, §53:24] Good faith in filing of application.

Facts did not show that an application had been filed for the purpose of impeding, obstructing or delaying the determination of another pending application for a station which would compete with a station with which the principals of the applicant here in question were connected.

[§25:7, §51:141] Effect of enlargement of issues; burden of proof.

The Commission in enlarging issues does not accept as true until rebutted at a hearing every supporting allegation made by a petitioner, even where the burden of proof is placed on the party against whom the issue is directed. The party must direct his efforts to the issue itself, and may prove his case in the manner he chooses within the scope of the issue. A party will not be held to have failed to sustain the burden of proof on an issue because it did not call as a witness an individual who was alleged, in a petition for enlargement of issues, to have consulted with another individual on a certain matter. No evidence on this subject matter had been introduced but the evidence in the record indicated that the claimed course of action had not existed.

[§51:301, §53:24] Effect of failure to amend application on good faith of applicant.

Refusal of applicant to amend to specify another frequency after it had apparently been pointed out to applicant that other frequencies were available, is not in itself enough to show that the application was not filed in good faith, especially where the other frequencies are less desirable ones from a coverage standpoint and would require use of a directional antenna.

THE NEXT PAGE IS PAGE 365

[§53:35] Multiple ownership; overlap of contours.

Overlap of the 5 mv/m contours of two stations is not a bar to a grant of an application, although the same individual is one of two partners in the applicant and owns a 1/3 interest in the existing station, where the overlap area represents less than 25% of all areas and populations within the 0.5 mv/m contours, numerous other services are available, neither station would furnish a primary service to the community served by the other, no overlap of 2.0 mv/m contours would result, and the applicant would bring a first transmission facility to a community.

[§53:24] Effect of interference.

Co-channel interference affecting 5.97% of the population within the normally protected contour of an existing station is no bar to a grant of an application for a first local station in a community of 5000, where the interference area is located some distance from the existing station and is served by numerous other stations.

[§53:24] Fair, efficient and equitable distribution of facilities.

While the Commission has a policy of fostering the establishment of at least one local broadcast facility in each community of appreciable size, this policy is not without limitations and each case must be decided on the basis of all the facts. The importance of providing a first local broadcast service to a community of 5000 is lessened by its small size and its location within a large metropolitan area with a substantial number of services, while the importance of providing a second local outlet to a community of 14,000 persons is enhanced by the fact that that community is not similarly located. Grant was made to the applicant for the latter community on the basis of these considerations and the further fact that the competing application involved destructive interference to a portion of the service area of an existing station, whereas the successful applicant would cause no destructive interference to any station.

**A p p e a r a n c e s**

Dwight D. Doty and Michael H. Bader (Haley, Doty, Wollenberg & Kenehan), on behalf of Plainview Radio; Norman E. Jorgensen (Krieger & Jorgensen), on behalf of Star of the Plains Broadcasting Company; A. Harry Becker, on behalf of Progressive Broadcasting Company (KCCO), respondent; and Richard E. Ely, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.



## DECISION

By the Commission: (Commissioner Bartley absent).

## Preliminary Statement

1. Earl S. Walden, Homer T. Goodwin and Leroy Durham, dba Plainview Radio (hereinafter sometimes referred to as "Plainview") and Troyce H. Harrell and Kermit S. Ashby, dba Star of the Plains Broadcasting Company (hereinafter sometimes referred to as "Star") through the above-captioned applications seek permits to construct standard broadcast stations at Plainview and Slaton, Texas, respectively. Both applicants propose to operate on 1050 kilocycles, daytime only, Plainview with power of one kilowatt, utilizing a directional antenna, and Star with power of 250 watts. Since it appeared that the proposed operations, if conducted simultaneously, would result in mutually destructive interference, the Commission, by order released October 9, 1956, designated both of these applications for hearing in a consolidated proceeding and (by corrected order released November 23, 1956), named Progressive Broadcasting Company, licensee of Station KCCO, Lawton, Oklahoma, (1050 kc, 250 w, DA-D) a party to the proceeding. The issues upon which hearing was initially designated and as subsequently enlarged are as follows: 1/

1. To determine the areas and populations which would receive primary service from each of the proposed operations, and the availability of other primary service to such areas and populations.

2. To determine whether the operation proposed by the Star of the Plains Broadcasting Company would involve objectionable interference with Station KCCO, Lawton, Oklahoma, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

3. To determine whether, because of the interference received, the proposal of the Star of the Plains Broadcasting Company would comply with §3.28(c) of the Commission's Rules, and if compliance with §3.28(c) is not achieved, whether circumstances exist which would warrant a waiver of said Section of the Rules.

4. To determine in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the operations in the above-captioned applications would better provide a fair, efficient and equitable distribution of radio service.

5. To determine whether Star of the Plains Broadcasting Company filed its above-entitled application for the purpose of impeding, obstructing or delaying determination on the above-entitled application of Plainview Radio.

1/ Pursuant to petition therefor filed by Plainview, the Commission by order released January 14, 1957, enlarged the issues in this proceeding to include those above designated as numbers 5, 6 and 7. In the same order the Commission placed the burden of proceeding with the introduction of evidence and the burden of proof concerning Issues 5, 6 and 7, supra, on Star of the Plains Broadcasting Company.





6. To determine the degree of overlap between the operation proposed by Star of the Plains Broadcasting Company at Slaton, Texas, and Station KVOP, Plainview, Texas.

7. To determine if the overlap, as evidenced under Issue 6, is so substantial as to violate §3.35 of the Commission's Rules and Regulations.

8. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

2. Apart from the above specified issues, both applicants were found basically qualified in all respects to operate their proposed stations. Pre-hearing conferences were held on November 26 and December 13, 1956. The hearing was held on December 28, 1956, on the issues which were initially designated (Nos. 1 through 4 inclusive, supra), and the record was closed on the same date. Thereafter, pursuant to the Commission's order released January 14, 1957, enlarging the issues in the instant proceeding, the record was reopened; hearing conferences were held on February 4, and 20, 1957; a further hearing was held on March 5, 1957 on the additional issues specified by the Commission (Nos. 5 through 7, inclusive, supra); and the record was finally closed on that date. Pursuant to the direction of the Hearing Examiner, on March 25, 1957, proposed findings of fact and conclusions with respect to all issues specified in the proceeding, with the exception of Issue No. 5, supra, were filed on behalf of the Commission's Broadcast Bureau and thereafter proposed findings of fact and conclusions on the entire record were filed on behalf of both of the applicants and the respondent therein and such findings and conclusions with respect to Issue No. 5, were filed on behalf of the Commission's Broadcast Bureau. On May 14, 1957, Hearing Examiner Hugh B. Hutchison released his Initial Decision which proposed to grant the application of Star and deny the application of Plainview. Exceptions to the Initial Decision and a brief in support thereof were filed by Plainview on June 3, 1957. On the same date Progressive Broadcasting Company filed exceptions to the Initial Decision. An answer to the exceptions of Plainview was filed by Star on June 13, 1957. On June 11, 1957, the Chief of the Broadcast Bureau filed a notice of his intention to appear at oral argument although he filed no exceptions. Oral argument was held before the Commission en banc on December 10, 1957. The Commission's rulings on the exceptions to the Initial Decision are set forth in Appendix A attached hereto.

### Findings of Fact

#### I. In re Issues Numbers 1, 2, 3, 4 and 6

##### A. The Plainview Proposal

3. In 1950 the population of Plainview, Texas, was 14,044 persons. There is one standard broadcast station authorized in Plainview (KVOP, 1400 kc, 250 w, U). Based upon the U.S. Census Report for 1950, the following areas and populations would be served by the operation proposed by Plaintiff: 2/

2/ The pertinent field intensity contours of the proposed station have been determined on the basis of ground conductivity values indicated by Fig. M-3 of the Rules and values of radiation shown on the proposed directional

[Footnote continued on following page]



Contour (mv/m)	Population	Area (sq. mi.)
2.0	71,347	3,895
0.5 (normally protected)	152,089	13,714
0.5 (interference-free)	144,616	12,143

4. The proposed Plainview station would receive interference from Stations KNCO, Garden City, Kansas, and KCCO, Lawton, Oklahoma, within 11.5% of its normally-protected service area, containing approximately 4.9% of the population within the normally-protected service area. Station KGNC, Amarillo, Texas, would provide primary service (0.5 mv/m or greater) to all of the proposed service area, while 31 other stations would provide such service to portions thereof. There would be a minimum of five and a maximum of 16 other services available within the proposed Plainview service area. In addition, six stations, including KVOP, now provide primary service (2.0 mv/m or greater) to the community of Plainview.

#### B. The Star of the Plains Broadcasting Company Proposal

5. In 1950 the population of Slaton, Texas, was 5,036 persons. There is no standard broadcast station authorized in that community. Slaton is located in Lubbock County, Texas, which, according to the 1950 U.S. Census of Population constitutes the standard metropolitan area for the city of Lubbock. According to the same census, in 1950 Lubbock had a population of 71,747 and Lubbock County a population of 101,048. The following standard (AM) broadcast stations are presently assigned to Lubbock:

Call Letters	Frequency	Operation
KCBD	1590 kc	1,000 w-U (DA-2)
KDAV	580 kc	500 w-D (DA)
KDUB	1340 kc	250 w-U
KFYO	790 kc	5,000 w-LS (DA-2)
		1,000 w-N (DA-2)
KLLL	1460 kc	1,000 w-D
KSEL	950 kc	1,000 w-LS

2/ [Footnote continued from preceding page].

antenna pattern. The populations of all cities of 2,500 or more located between the 2.0 mv/m and the 0.5 mv/m contours were not included. In determining interference to the proposed Plainview operation, the unattenuated field intensity at one mile of KNCO, Garden City, Kansas has been taken as 193 mv/m, based on the antenna system dimensions and Figure 8 of the Rules. The unattenuated field intensities in pertinent directions from Station on KCCO, Lawton, Oklahoma, have been taken from the measured KCCO directional antenna pattern. Ground conductivity in the vicinity of KCCO has been determined by analysis of the proof-of-performance measurements. Ground conductivity in other directions and locations has been taken from Fig. M-3 of the Rules. The equivalent distance method has been used to combine differing values of ground conductivity.



6. Based upon the U.S. Census Report for 1950, the following areas and populations would be served by the operation proposed by Star: 3/

Contour (mv/m)	Population	Area (sq. mi.)
2.0	103,969	1,521
0.5 (normally protected)	153,410	6,746
0.5 (interference-free)	145,140	5,362

The City of Lubbock falls within the 2.0 mv/m contour.

7. Four stations provide primary service (0.5 mv/m or better) to all of the area proposed to be served, while 25 stations provide service to portions thereof. There would be a minimum of 10 and a maximum of 19 other services (0.5 mv/m or better) available within the proposed Star service area. In addition, seven stations provide primary service (2.0 mv/m or greater) to the community of Slaton.

8. Station KCCO, Lawton, Oklahoma, provides primary service to 172,441 persons in an area of 8,969 square miles. KCCO presently receives co-channel interference within this contour from Station KFMJ, Tulsa, Oklahoma, 4/ which affects 1,605 persons (approximately 0.93%) in an area of 83 square miles. This area occurs as a strip 3 miles wide inside the eastern portion of the 0.5 mv/m contour. The proposed operation would cause additional interference to Station KCCO which would involve 10,308 persons (approximately 5.97%) in an area of 1,050 square miles (approximately 11.67%), so that the total interference received by Station KCCO would be to 11,913 persons and 1,133 square miles, or approximately 6.9% of the population and 12.6% of the area within the 0.5 mv/m contour. This interference area would develop in the southwestern portion of the KCCO service area approximately 146 miles from Slaton 5/ and between 47 and 75 miles from Lawton and would not overlap the existing interference area resulting from the operation of Station KFMJ. Five stations provide primary service to all of the KCCO service area which would be lost due to interference from the proposed operation, while 17 stations provide such service to portions thereof. There would be a minimum of 10 and a maximum of 15 other services available to that portion of the KCCO primary service area which would be lost due to interference from Star's proposal. There is no evidence in this record to indicate that the proposed operation would result in objectionable interference to any other existing station.

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3/ The pertinent contours of the proposed operation have been determined on the basis of an effective field of 88 mv/m unattenuated at one mile and ground conductivity values indicated by Fig. M-3 of the Rules. Cities and towns of 2,500 persons or more which would receive less than 2.0 mv/m service were not included.

4/ Interference to KCCO resulting from the KFMJ operation was based on field intensity measurements made on Station KFMJ on radials bearing 214.5 and 231 degrees from the KFMJ site. These measurements were filed with the Commission by KCCO in the hearing on the KCCO application for its present facilities.

5/ Computed from the Sectional Aeronautical Charts.

9. The proposed operation would receive interference within its normally protected (0.5 mv/m) contour from Station KCCO in an area of 1,384 square miles containing a population of 8,270. 6/ The population which would not be served because of interference received from KCCO thus amounts to 5.4% of the total population (153,410) and 20.5% of the total area (6,746 square miles) within the normally protected (0.5 mv/m) contour.

10. Plainview, Texas, is approximately 55 miles north of Slaton, Texas. Operating as proposed at Slaton, Star's 0.5 mv/m interference-free contour would overlap the corresponding contour of Station KVOP (1400 kc, 250 w, U) at Plainview in an area of 967 square miles containing a population of 14,003. 7/ Neither the existing nor proposed station would provide primary service (2.0 mv/m or greater) to the principal community served or proposed to be served by the other. There would be no overlap of the 2.0 mv/m contours. The area and population within the overlap area represent 18.0% and 9.6%, respectively, of the area and population within the proposed interference-free contour, and 22.1% and 23.5%, respectively, of the area and population within KVOP's interference-free daytime contour. Excluding KVOP, primary service (0.5 mv/m) daytime is provided to all of the overlap area by nine stations while a minimum of 11 and a maximum of 18 stations provide such service to portions thereof.

11. KVOP, Inc., is the corporate licensee of KVOP, Plainview, Texas. All of the authorized common voting stock of the corporation is issued and outstanding. Such stock is held by the following individuals in the specified proportions: W. J. Harpole, President and director, 66.6%; Mrs. W. J. Harpole (wife of W. J. Harpole), Vice-President and director, 0.1%; and Kermit S. Ashby, Secretary-Treasurer, 33.3%. Mr. Ashby is not related to either of the Harpoles. He has been the general manager of Station KVOP since 1950. Star of the Plains Broadcasting Company is a partnership composed of Troyce H. Harrell and Kermit S. Ashby. Each holds a 50% interest.

## II. In re Issue Number 5

12. Issue No. 5 requires a determination whether Star of the Plains Broadcasting Company filed its application in this proceeding for the purpose of impeding, obstructing, or delaying determination on the competing application

6/ In determining interference to the proposed Slaton operation the unattenuated field intensity at one mile of KCCO has been taken from the measured KCCO directional antenna pattern. Ground conductivities indicated by the KCCO proof-of-performance were used to the extent of measurements. Beyond the measurements ground conductivities values were taken from Fig. M-3 of the Rules.

7/ Population figures are based on 1950 U.S. Census data and were determined by plotting the contours on a Minor Civil Division map and totalling the populations of the MCDs included. Where only a part of a MCD fell within a contour, uniform distribution of population therein was assumed in determining the portion included. Cities and towns of 2,500 population or more which would receive less than a 2.0 mv/m signal were not included.



of Plainview Radio. This issue was added on the basis of allegations made by Plainview Radio in its petition to the effect that the licensee of Station KVOP, the only existing station in Plainview, Texas, inspired the filing of the Star of the Plains application and the previous filing of the mutually exclusive application, later dismissed, of Santa Rosa Broadcasting Company for a new station at Santa Rosa, New Mexico, in order to keep a competing radio station out of Plainview as long as possible.

13. On November 9, 1955, Plainview Radio filed its application with the Commission. On January 24, 1956, an application, which was mutually exclusive therewith, for a permit to construct a station at Santa Rosa, New Mexico, was filed by John E. Hall, Jack V. Aubuchon, and William T. Kemp, a partnership doing business as Santa Rosa Broadcasting Company. On April 4, 1956, Star of the Plains, a partnership, owned equally by Troyce H. Harrell and Kermit S. Ashby, filed its application. <sup>8/</sup> On May 29, 1956, the Santa Rosa application was dismissed, in accordance with §1.381 of the Commission's Rules, because the applicant failed to respond to a letter written it by the Commission on March 28, 1956, requesting additional information and advising it of the necessity for a hearing.

14. The ownership interest of Kermit S. Ashby in the licensee of Station KVOP and his association with that station have been described in Paragraph 11, supra. The relationships between W. J. Harpole, principal stockholder of KVOP, William T. Kemp, a partner in the Santa Rosa applicant, Harrell and Ashby, in the Great West Company, licensee of Station KVWO, Cheyenne, Wyoming, and the employment and association of Kemp and Harrell at Stations KVOP and KVWO, are set forth below, as follows:

(1) W. J. Harpole (of KVOP) and Kermit S. Ashby (of KVOP and Star) owned 26.60% and 13.33%, respectively, of the Great West Company, Inc., (KVWO); <sup>9/</sup> Troyce Harrell (of Star), and William T. Kemp (of Santa Rosa) owned 20% and 39.4%, respectively, of the licensee of KVWO.

(2) Troyce Harrell is employed as a salesman at KVOP and has been an employee of the station for about ten years (1946-'53; 1954-present). Although he has no financial interest in KVOP from the standpoint of having stock in the station, he receives a percentage of the gross revenues of the station above a certain figure in addition to his salary.

(3) William T. Kemp was manager of KVOP during a period from 1946-'48, at which time Troyce Harrell was an employee of the station.

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<sup>8/</sup> The application was sent to the Commission in March but was returned for correction and additional material and was not stamped as received until April 4, 1956.

<sup>9/</sup> Although official notice of the officers, directors and stockholders of Great West and the proportional holdings of each was requested on the record, the percentages as reported in the transcript do not precisely conform to those reflected in Commission records. The Commission was notified in February, 1957, that Harrell, Harpole, Ashby and Kline had agreed to sell their interests in KVWO to others. The proposed transfer was granted by the Commission on March 13, 1957.

(4) Troyce Harrell was general manager of KVWO during the period 1953-'54. He had "policy or program disagreements" with William T. Kemp, then president and largest stockholder of KVWO, and returned to KVOP in 1954.

15. In the event of a grant Harrell "will actively manage the station, residing in Slaton," and "policies of KVOP, Plainview, and Star of the Plains Broadcasting Company in Slaton will be completely divorced." 10/

16. Kermit S. Ashby and Troyce H. Harrell represented in their testimony that Star of the Plains made application for a standard broadcast station at Slaton, Texas, in "good faith," and that at no time had there been any intent on their part to obstruct, delay, or impede any other application anywhere. They further testified that the application was filed with the "singular" purpose and full intent of building the station applied for if the Commission ruled in their favor, and stated their willingness to accept a construction permit conditioned upon the station's being on the air or in advanced states of construction within six months from the award of such permit. 11/

17. It appears from the un rebutted testimony of Harrell and Ashby that neither of these individuals had talked with or seen William T. Kemp in over a year prior to November 6, 1956; that they had no knowledge of his relations or intent with regard to the Santa Rosa application; that they first learned of this application and of its subsequent dismissal through a trade publication; that they had no previous knowledge of the application; and that they had made no agreement, arrangement, or contact in connection therewith. In fact, at the time of the hearing, March 5, 1957, Harrell testified that he did not even know the whereabouts of Mr. Kemp. 12/

10/ The foregoing finding is based on a portion of the affidavit of Mr. Harrell. Exceptors contend that this is incompetent evidence for Mr. Harrell has no financial interest in Station KVOP and does not know what the policies of KVOP will be. The Examiner did not err in receiving this statement in evidence. There was opportunity to cross-examine Mr. Harrell with respect to this matter and, as a 50% owner of Star, Mr. Harrell is qualified to testify as to the policies the Star will follow even though he has no control over the policies of Station KVOP.

11/ Exception is taken to these findings as a recitation of conclusionary testimony which should have been stricken. We do not agree. The Examiner properly concluded that, under the circumstances of this case, a statement by the owners of Star as to their motive in filing an application for Slaton is both relevant and necessary to the question of intent and good faith. He further correctly concluded that whether the intent testified to is borne out by the facts is a separate consideration in reaching a conclusion with respect to this matter. *Heitmeyer v. Federal Communications Commission*, 95 F.(2d) 91 (1937), upon which exceptors rely in support of their contention, is only indirectly in point and says nothing with respect to the instant evidentiary situation.

12/ The record is silent as to what knowledge, if any, Mr. Harpole, the president and majority stockholder of the existing station in Plainview, had of the proposed filing of the Santa Rosa application or whether he discussed with Mr. Kemp the advisability of filing it. The record does disclose, however, that the engineer who prepared the Santa Rosa application made no frequency search with respect thereto.



18. Harrell and Ashby first became interested in Slaton in January, 1955, and early in that year contacted an engineer (W. O. Stewart) and requested him to find a frequency which could be used there. Subsequently, according to Harrell, in the spring of 1955, Stewart reported that he was unable to find a frequency which would work in Slaton unless, possibly, a directional antenna were utilized. Stewart was not compensated for his investigation at Slaton but it was understood that he would prepare any application which might be filed. Both Harrell and Ashby testified that they were not notified by Stewart that 1050 kilocycles might be available for a station in Slaton, but that they found out for themselves. This knowledge was derived from publicity given to the Plainview Radio application in Broadcasting Magazine, perhaps a week or two after the application was filed on November 9, 1955. Very shortly after this, the parties to the Star application contacted Stewart and instructed him to find the best frequency possible for operation at Slaton and inquired if 1050 kilocycles would not work. There is in evidence an affidavit executed by W. O. Stewart on November 2, 1956, which states, among other things, that the affiant a "licensed consulting engineer" had "made exhaustive frequency searches" for an AM broadcast station on behalf of Ashby and Harrell and that as a result thereof he had found, late in 1955, that the only non-directional frequency available for Slaton was 1050 kilocycles. 13/ Harrell admitted, on cross-examination, that Stewart had never done any previous work for him or his associates and his testimony also indicates that no attempt had been made by the principals of Star to ascertain whether Stewart was qualified to make a frequency survey. Mr. Harrell did not know that the proposed operation at Slaton would cause interference to Station KCCO, Lawton, Oklahoma, until after KCCO was made a party to the hearing. It further appears from the evidence that at the time of the hearing Mr. Stewart was not a licensed consulting engineer and had never, in fact, made application for registration as such in the State of Texas.

19. The principals of Star represented, in substance, that prior to late November, 1955, they believed that the frequency 1050 kilocycles was not available for use in Slaton inasmuch as it was tied up in a hearing at Muleshoe, Texas, and also was involved in a hearing pertaining to Lawton, Oklahoma, and Wichita Falls, Texas. Harrell testified the reason Star did not file its application sooner, upon becoming aware of the frequency's availability, was that at the time (presumably in late November, 1955) they were engaged in negotiations looking toward the purchase of Station KVWC in Vernon, Texas, and they were not in a position to buy a station in Vernon and build one in Slaton. 14/

13/ The above affidavit, the contents of which were prepared by Mr. Harrell, was admitted into evidence solely for the purpose of showing that reliance was placed on the information contained therein by the principals of Star in selecting the frequency 1050 kilocycles and not as proof of any facts whatsoever.

14/ The Commission's records indicate that although applications were filed for permits to construct a standard broadcast station at Muleshoe, Texas, to operate on 1050 kilocycles, those applications were amended prior to designation for hearing in August, 1954, to specify operation on the frequency 1570 kilocycles. The Commission's records also indicate that on March 10, 1955, a permit was granted to Progressive Broadcasting Company to construct a standard broadcast station to operate on 1050 kilocycles at Lawton, Oklahoma.

20. In March, 1956, the principals of Plainview learned of the Slaton application (apparently through a trade publication). Upon learning of this application, Homer T. Goodwin, a partner in Plainview, called Troyce Harrell and suggested a meeting to see if there was some way to resolve the conflict between the applications. This meeting, lasting about two hours, was held on the afternoon of March 29, 1956, at Goodwin's home, with Harrell, Goodwin and Leroy Durham, another partner in Plainview, in attendance. Goodwin testified he made notes of the meeting the same afternoon after it was concluded. Harrell testified in substance that he had typed a summary of his version of what occurred at the meeting the afternoon it was held.

21. The evidence is conflicting in some respects concerning what was actually said by Harrell and Goodwin during the course of their discussion at the March 29th meeting. According to Harrell, Goodwin stated, at this meeting, that his voice was failing him and he desired to carry on his ministry over the radio; that perhaps an arrangement could be worked out whereby Harrell could be manager of the station proposed by Plainview; and that Goodwin had stated that the Slaton application was designed to block the Plainview application. Goodwin denied, however, that he had said he desired to carry on his ministry over the radio but claimed that he had stated that he wanted a position with the proposed Plainview station as a means of livelihood. He also denied that he had suggested that Harrell might be the manager of the proposed station. Moreover, he claimed that Harrell first brought up the matter of the block application by a statement to the effect that "You think this application is a block application to yours" and that this matter had not been previously broached by Durham or himself. Goodwin also testified that at this meeting Harrell had mentioned having filed an application for a Texas coastal town which had been denied and that he and his associate were looking for another good city or town which did not necessarily have to be Slaton; that, without prompting, Harrell had volunteered a statement to the effect that W. J. Harpole had had nothing to do with the Star application; had stated that the principals of the Star applicant had not had a frequency survey made for Slaton; and that Harrell had made the statement that "We are not particularly interested in 1050 kilocycles but any frequency which will work." On the other hand, Harrell testified that at this meeting he did not mention having an application denied on the Texas coast; that he had no recollection of having mentioned Harpole or a frequency survey, but that the subject of frequencies did come up; and that, while he could not recall his exact words with reference to his interest in 1050 kilocycles, the meaning which he had intended to convey was that he wanted any station which would work as well on a lower frequency. Harrell further testified that at the March 29th meeting he had stated that he would be amenable to any reasonable request which would be to the mutual benefit of the participants but that Stewart, his engineer, had stated that only 1050 kilocycles would work on a non-directional basis and that to get the engineers of the parties together would require an additional expense, with success unlikely. <sup>15/</sup> Goodwin testified that a substantially similar statement had been made by Harrell in response to his suggestion that the participants at the meeting attempt to get their respective engineers together to see if the controversy could be resolved.

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<sup>15/</sup> He also stated at the March 29th meeting that Star would not withdraw its application even if the engineer for Plainview could prove that 1050 kilocycles would not work in Slaton because they had faith in their own engineer's ability to the point of processing the application with the Commission.





22. After the March 29, 1956 meeting, at the request of the principals of Plainview, a frequency search was made for Slaton by a qualified consulting radio engineer, the results of which were reported to them on June 21, 1956. The consulting engineer for Plainview testified that the search showed that the frequencies 1410, 1420 and 1430 kilocycles could all be used in Slaton and that no interference would be caused to other stations if directional antennas were used. The search also indicated that while some interference would be caused to Station KPEP, San Angelo, Texas, by a non-directional operation at Slaton on 1420 kilocycles, with power of 500 watts, such interference would be very much less than would be caused to Station KCCO at Lawton, Oklahoma, by a non-directional operation at Slaton on 1050 kilocycles, with power of 250 watts, as proposed herein by the Star application. 16/

23. As a result of the frequency survey, Goodwin arranged another meeting between the parties to the respective applications to see if there was some way they could iron out their difficulties. This meeting was held in Plainview on August 21, 1956, and was attended by all parties to both applications. While the record is not entirely clear on the point, the evidence does indicate that Harrell and Ashby were apprised of the availability of other frequencies which had been disclosed by the Plainview survey. However, in response to inquiry from Goodwin as to whether, in the face of the survey, Harrell and Ashby still intended to prosecute the Star application for 1050 kc, they both replied that they did. Goodwin testified that at this meeting Ashby had stated in effect that he and Harrell had not known the frequency 1050 kilocycles was available for Slaton until they had seen a news release reporting the filing of the Plainview application and that they had begun to prepare an application for a station on that frequency. Ashby had previously testified that he could not recall such a statement but did recall having said that they thought 1050 was tied up.

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16/ There was offered and received in evidence on behalf of Star of the Plains an affidavit of David P. Pinkston, a principal in the operation of Station KPEP at San Angelo, Texas. In this affidavit Mr. Pinkston states, inter alia, that he would resist any application in Slaton proposing non-directional operation on 1420 kilocycles with 500 watts power because of alleged destructive interference from such operation to the service of KPEP. This affidavit was admitted only for the limited purpose of showing that reliance was placed thereon by the principals of Star of the Plains and not as proof of any facts contained therein.